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Recent Amendments to the Foreign Sovereign Immunities Act: Strategic Tool, Cruel  
Hoax, or Untenable Impediment to Foreign Policy

By

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## Introduction

As part of its mission, the military is at the forefront of the battle against terrorism both as potential targets for terrorists, and as the vanguard force defending U.S. citizens and interests abroad. A hallmark of U.S. military experience in the last decade has been doing more with less<sup>1</sup>. Doing more with less necessitates the military look for more efficient means of accomplishing missions, as well as reviewing the feasibility of unconventional and, perhaps, previously unconsidered strategies and operating procedures. To further complicate matters for military commanders, political leaders require that the military carry out its assigned missions with minimal loss of life and casualties. While this is a noble sentiment, it creates an additional burden for those tasked with carrying out the nation's military missions<sup>2</sup>. With these parameters in mind, it makes sense to look at a recent change in federal law that might fashion a strategic tool in the fight against terrorism. This paper considers whether the recently amended Foreign Sovereign Immunities Act<sup>3</sup> constitutes a viable strategic tool in combating terrorism, or whether it is a domestic law giving plaintiffs judgments they might never recover on or, lastly, that it might be a strategic tool, but one too troublesome in terms of foreign policy to be useful to government strategists. This paper will conclude with

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<sup>1</sup> Statement of Rep. Floyd D. Spence, Chairman of the House National Security Committee, as quoted in Air Force Magazine, July 1997, Pg. 90.

<sup>2</sup> Eric Black, U.S. military's new missions: low risk and lots of them, Star Tribune (Minneapolis, MN), Oct. 27, 1999, Pg. 81A.

<sup>3</sup> *Civil Liability for Acts of State Sponsored Terrorism*, Pub. L. No. 104-208, Div. A., Title I § 101(c) [Title V, § 589, 110 Stat. 3009-172, (30 September, 1996, reprinted at 28 U.S. C. A. § 1605(a)(7) (West. Supp. 1999 (creating jurisdiction against foreign entities who provide material support for acts of extrajudicial killing, *inter*

a judgment that a better strategic mechanism would allow an international judicial body to hear cases based on an UN treaty<sup>4</sup>, thereby reducing strains on comity and reciprocity which result from having domestic law impact international relations. This conclusion is based on recent trends and developments in international law, as well as the need for the executive branch of government to resolve the logical inconsistency the FSIA engenders in terms of putting interests of U.S. citizens in opposition to national foreign policy concerns. Beginning similar prosecutions in the international sphere will make for a more effective strategic tool and reduce the likelihood of damaging bilateral foreign relations as a result of domestic law prosecutions.

### **Foreign Sovereign Immunities Act**

The Foreign Sovereign Immunities Act (FSIA) is an explicit statement of how legal relations between U.S. citizens and foreign countries are handled. The FSIA provides the sole basis for U.S. citizens wishing to sue foreign countries in the domestic courts of the U.S.<sup>5</sup>. Foreign countries are considered presumptively immune to domestic lawsuits unless an exception is provided under the FSIA<sup>6</sup>. In

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*alia*), (commonly called the "Flatow Amendment"), as cited in *Flatow v. Iran*, 1999 U.S. Dist. LEXIS 18956, Dec. 10, 1999, at Pg. 3

<sup>4</sup> At present there is not a UN treaty providing a civil remedy to victims of terrorism. A conclusion of this paper is that such a treaty is the next logical step in combating terrorism, following in the footsteps of the International Criminal Court and the International Convention for the Suppression of the Financing of Terrorism.

<sup>5</sup> *Argentine Republic vs. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) as cited in G. Michael Ziman, "Comment: Holding Foreign Governments Accountable for Their Human Rights Abuses: A Proposed Amendment to the Foreign Sovereign Immunities Act of 1976, 21 Loy. L.A. Int'l & Comp. L.J. 185, March, 1999, at 211.

<sup>6</sup> At one time the concept of sovereign immunity was thought to be absolute, i.e. there was no cause of action against foreign sovereigns. Over time, the concept of restrictive sovereign immunity has become more popular. Under this concept foreign sovereigns have immunity for acts that are consistent with their role as sovereigns. They are not immune for things like commercial activities or terrorist acts, which are considered outside the scope of actions as a sovereign.

1996 Congress amended the Foreign Sovereign Immunities Act to allow civil lawsuits by American victims of terrorism against foreign nations identified as state sponsors of terrorism<sup>7</sup>. President Clinton requested this amendment in response to the Brothers to the Rescue shoot down incident, where a Cuban MIG shot down two civilian aircraft containing three American citizens over the Florida Straits<sup>8</sup>. The specific purpose of requesting this amendment was to provide compensatory damages to victims of terrorism who obtain judgments under the statute<sup>9</sup>. In response to the President's proposal, Congress amended the FSIA to allow lawsuits in U.S. federal courts against countries<sup>10</sup> accused of sponsoring acts of terrorism<sup>11</sup>. As expected, plaintiffs filed a number of lawsuits upon enactment of the amendment<sup>12</sup>. To date, at least three lawsuits have adjourned with plaintiff's

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<sup>7</sup>See Note 3.

<sup>8</sup> *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1242 (S. D. Fla. 1997)

<sup>9</sup> MEET THE PRESS (NBC Television Broadcast, November 7, 1999) (Interview with White House Chief of Staff John Podesta)(re-broadcasting February 26, 1996 videotape of President Clinton, where he stated "I am asking that Congress pass legislation that will provide immediate compensation to the families, something to which they are entitled under international law, out of Cuba's blocked assets here in the United States. If Congress passes this legislation we can provide compensation immediately."), as cited in *Flatow v. Iran*, 1999 U.S. Dist. LEXIS 18956, Dec. 10, 1999

<sup>10</sup> Only countries designated by the State Department as "State Sponsors of Terrorism" are potential defendants under this statute. This designation is authorized by both the Export Administration Act of 1979 (50 U.S.C. § 2405(j) (1994) and the Foreign Assistance Act of 1961 (22 U.S.C. § 2371 (1994), as cited in John F. Murphy, *Civil Liability for the Commission of International Crimes as an Alternative to Criminal Prosecution*, 12 Harv. Hum. Rts. J. 1, at 40. See also John R. Schmertz, Jr., *Foreign Sovereign Immunity*; Vol. 3, No. 7, International Law Update, copyright 1997 Transnational Law Associates, LLC. Countries currently designated as State Sponsors of Terrorism are Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Syria. The State Department recently announced it is considering adding Pakistan to this list.

<sup>11</sup> *Civil Liability for Acts of State Sponsored Terrorism*, Pub. L. No. 104-208, Div. A., Title I § 101(c) [Title V, § 589, 110 Stat. 3009-172, (30 September, 1996, reprinted at 28 U.S.C. A. § 1605(a)(7) (West. Supp. 1999 (creating jurisdiction against foreign entities who provide material support for acts of extrajudicial killing, *inter alia*), (commonly called the "Flatow Amendment"), as cited in *Flatow v. Iran*, 1999 U.S. Dist. LEXIS 18956, Dec. 10, 1999. There are a number of other prerequisite requirements to bring suit under the amended statute including that the country must have been labeled a state sponsor of terrorism by the State Department and that only U.S. citizens are proper plaintiffs.

<sup>12</sup> See *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997), *Flatow v. Republic of Iran*, 999 F. Supp. 1 (D. D. C. 1998), *Cicippio v. Republic of Iran*, 18 F. Supp. 2d 62 (D. D. C. 1998), *Rein v. Socialist People's Libyan Army Jamahiriya*, 995 F. Supp. 325 (E. D. N. Y. 1998)

winning judgments totaling nearly \$500 million dollars<sup>13</sup>. Several other cases are currently pending.<sup>14</sup> In *Flatow v. Iran*<sup>15</sup>, a suicide bomber killed American college student Alisa Flatow in a bomb attack on a bus in Israel where she was studying for the summer<sup>16</sup>. In *Alejandro vs. Cuba*<sup>17</sup>, the victims were four Cuban-American pilots who regularly flew over the Straits of Florida in private planes searching for Cubans immigrating to the United States<sup>18</sup>. *Cicippio vs. Iran*<sup>19</sup> involved a group of Americans taken hostage in the 1980's in Lebanon by the Hezbollah<sup>20</sup>. In terms of development of the law in this area and aggressive pursuit of the adjudged defendants, *Flatow* and *Alejandro* are the most advanced cases, and those most commonly cited by scholars and commentators. However, the only amount collected from any of these cases at present is \$1.2 million dollars, provided to the families of the four Cuban-American pilots killed in the Brothers to the Rescue incident<sup>21</sup>. Interestingly, the U.S. government provided the funds in that case before the lawsuit was filed under the amended FSIA. It is also notable that the funds were Cuban assets held as blocked assets under the IEEPA<sup>22</sup>, a source of

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<sup>13</sup> See note 4 above, *Alejandro*, at 1254 (\$187,627,911); *Flatow*, at 102-3 (\$247,513,220); *Cicippio*, at 23-4 (\$65,000,000); *Rein* was appealed on jurisdictional grounds and has yet to come to trial.

<sup>14</sup> See *Rein* at note 12. Also, Bill Miller, Ex-Hostage Anderson Files Suit Against Iran; Journalist Seeks \$100 Million, Says Government Supported Extremists in Lebanon, *Washington Post*, March 23, 1999, at pg. A-5, noting filing of suits by former hostage Terry Anderson and the family of LTCOL William R. Higgins, USMC.

<sup>15</sup> See *Flatow* at note 12.

<sup>16</sup> *Id.*, at 7-9.

<sup>17</sup> See *Alejandro* at note 12.

<sup>18</sup> *Id.*, at 1254

<sup>19</sup> See *Cicippio* at note 12.

<sup>20</sup> *Id.*, at 64.

<sup>21</sup> Bill Miller, John Mintz, Once-Supportive U.S. Fights Family Over Iranian Assets, *Washington Post*, Sept. 27, 1998, page A-8. Each of the families was provided with \$300,000. One of the families was provided with this amount even though their relative was not an U.S. citizen and, consequently, ineligible for recovery under this statute.

<sup>22</sup> *Id.* See also, the International Emergency Economic Powers Act, 50 U.S.C. 1701-1702.

funding for existing judgments the Clinton administration now contends should not be accessible to plaintiffs in these cases. The U.S. currently holds 3.4 billion dollars as frozen assets of foreign countries<sup>23</sup>.

As a result of difficulties encountered by plaintiffs in collecting judgments against state sponsors of terrorism within the United States, Congress again amended the FSIA in 1998<sup>24</sup>. The 1998 amendment allowed attachment of certain classes of diplomatic and consular property, thereby liberalizing the FSIA and potentially lessening the requirements necessary to collect on court awarded judgments<sup>25</sup>.

Other aspects of the amendment allowed recovery of punitive damages as well as attachment of property unrelated to the harm incurred<sup>26</sup>. The amendment also contained a provision allowing the President to deny execution of judgments by exercising a national security waiver<sup>27</sup>. The day the amendment became law, President Clinton issued Presidential Determination 99-1<sup>28</sup>, which effectively blocked efforts of the Flatow family to attach former Iranian diplomatic and consular property in Washington, D.C.<sup>29</sup>. Subsequently, the Clinton administration

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<sup>23</sup> Stuart E. Eizenstadt, Deputy Secretary of the Treasury Department, Testimony Before the Senate Judiciary Committee Subject-“Terrorism: Victim’s Access to Terrorist Assets”, October 27, 1999.

<sup>24</sup> Contained in § 117 of the Treasury and General Government Appropriations Act of 1999, as contained in the Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub L. No. 105-277, 112 Stat. 2681 (1998), as cited in Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 A. J. I. L. 161, 185-188

<sup>25</sup> Id.

<sup>26</sup> One of the previous requirements for attachment of property of a sovereign had been to show a nexus between the harm incurred and the property to be attached.

<sup>27</sup> See note 24 above.

<sup>28</sup> Presidential Determination No. 99-1, Weekly Comp. Pres. Doc. 2088 (Oct. 21, 1998). Id.

<sup>29</sup> Senator Orrin Hatch, Prepared Statement of Sen. Orrin Hatch Before the Senate Judiciary Committee Subject-“Terrorism: Victim’s Access to Terrorist Assets”, October 27, 1999

has opposed all efforts by the litigants in the Flatow or Alejandre cases to collect on their judgments. Congressional response to these actions by the President has been to again attempt amendment of the FSIA<sup>30</sup>. The proposed amendment would severely limit a President's ability to exercise a waiver of these judgments. The proposed amendments would also restrict the definition of consular or diplomatic property; thereby increasing the ability of litigants to attach what might previously have been defined as diplomatic or consular property. The intent of the proposed amendments is to lessen the likelihood of further waivers by the President and to clarify which classes of property should be available to plaintiffs. At present, Congress has not passed this latest amendment, but in speaking with the attorney representing the Flatow family, there is a substantial expectation of passage of the newly proposed amendments within the next year<sup>31</sup>.

### **Strategic Analysis of FSIA**

While the FSIA was specifically amended to provide compensation to U.S. victims of terrorism, it also has enormous potential to deter state sponsors of terrorism from carrying out terrorist acts on U.S. citizens<sup>32</sup>. This statute puts tortfeasors (defendants) on notice of costs associated with terrorist conduct and confronts

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<sup>30</sup> Bill to Modify the Enforcement of Certain Anti-Terrorism Judgments, and For Other Purposes, S. 1796, § 1(3)(A), 106<sup>th</sup> Cong. (1999) (proposed bill that would amend Section 1610(f) of the FSIA to permit, *inter alia*, the attachment of foreign mission property used for nondiplomatic purposes such as rental property, as well as any rental proceeds), as cited in Flatow v. Iran, 1999 U.S. Dist. LEXIS 18956, December 10, 1999, at 32.

<sup>31</sup> Telephone conversation with Mr. Steven Perles on Jan. 25, 2000. The amended bill has nearly 20 Senate sponsors from both political parties.

them with the fact that those costs must be considered in deciding on future acts of terrorism<sup>33</sup>. Having those costs considered, and increasing those costs so as to outweigh the perceived benefit of sponsoring terrorism is of obvious strategic benefit to the U.S. government in protecting potential future victims of terrorism and deterring those considering such actions<sup>34</sup>. Imposing those costs on state sponsors of terrorism by way of litigation is a largely unexplored avenue in terms of strategy in the fight against terrorism.

This type of deterrent action would also mesh nicely with other non-military strategic tools the U.S. government currently uses to influence foreign government behavior. Pursuing this legislation as a form of strategy adds another dimension to the more commonly recognized governmental strategic tools of economic sanctions<sup>35</sup> and impounding or blocking assets<sup>36</sup>. Sanctions keep benefits from flowing to punished nations. Impounding or blocking assets puts assets within the U.S. on hold pending a change in relations or resolution of differences between the foreign government and the U.S. government. Combining these forms of action

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<sup>32</sup> Patrick Clawson, Director For Research, The Washington Institute, Testimony Before the Senate Judiciary Committee Subject-"Terrorism: Victim's Access to Terrorist Assets", October 27, 1999.

<sup>33</sup> Daniel Kurtzman, Flatow Damage Award may Deter Terrorists, Judge Says, Jewish Telegraphic Agency, March 13, 1998, quoting Judge Royce Lamberth. This is a tenet of the economic theory behind tort law. It is also one of the justifications for punitive damages.

<sup>34</sup> Senator Frank Lautenberg, News Release: Flatow *Family's Unprecedented Lawsuit Will Help Deter Future Acts of Terrorism* (February 26, 1997) as cited in Flatow, at p.24; See also Note 31.

<sup>35</sup> Trading with the Enemy Act, 50 U.S.C. App. 5(b) is the primary tool used to emplace unilateral financial sanctions.

<sup>36</sup> Blocking of assets is typically accomplished via the International Emergency Economic Powers Act, 50 U.S.C. 1701-1702.

with judgments obtained as the result of civil litigation would logically enhance the effectiveness of non-military options in influencing foreign governmental behavior<sup>37</sup>.

Another benefit of using this legislation to deter terrorism is that is nearly cost free to the U.S. government. Private attorneys who are paid on a contingent fee basis by their clients to undertake these actions. It might also prove true that private attorneys are more aggressive and effective in gathering payment from the offending countries and in consequently deterring terrorism than the government might be in carrying out sanctions enforcement or freezing assets. Current events, for better or worse, demonstrate the strength of the plaintiff's bar in civil litigation. The plaintiff's bar has become such a powerful force, and one with such political backing that it might well be considered as one of the most powerful NGOs in the country today<sup>38</sup>. The question becomes one of whether the plaintiff's bar, with its strength and political clout, might effectively use this legislation to deter international sponsorship of terrorism, and in a most unlikely result, significantly assist the U.S. government in efforts to punish and deter state sponsors of terrorism. Examples of the strength of the plaintiff's bar are the recovery of over

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<sup>37</sup> Compare testimony of Assistant Secretary of Treasury Stuart Eizenstadt at note 23. Eizenstadt argues that blocked assets provide leverage in negotiating with foreign countries and if the assets are provided to plaintiffs that source of leverage will be non-existent. A contrary argument can be made that if the government wishes to negotiate with countries it should not place them on the State Sponsors of Terrorism List maintained by the State Department (see note 10 above).

<sup>38</sup> Paul A. Gigot, Gore Slams Doerr on Silicon Valley, *The Wall Street Journal*, May 21, 1999, at p. A12 (asserting that President Gore was forced to choose sides in terms of a tort reform bill and sided with trial lawyers); Editorial, The Lawyer's Party, *The Wall Street Journal*, Oct. 5, 1999, at p. A26 (editorial maintaining that the Democratic party is beholden to trial attorneys); Paul Barrett, Civil Action: Why Americans Look To the Courts to Cure The Nation's Social Ills, *The Wall Street Journal*, Jan. 4, 2000, at p. A1 (article noting career of Michael Hausfeld, an

5 billion dollars from German companies by survivors of the holocaust, litigation involving the cigarette industry, and litigation that might be brought against gun manufacturers or alcohol producers in the future<sup>39</sup>. While these are causes and cases that not all agree with in theory or outcome, they nevertheless demonstrate the power and tenacity of the plaintiff's bar in pursuing defendants.

One would assume that the U.S. government would be keenly interested in highlighting and maximizing the potential cost of sponsoring terrorist acts as a method of influencing governmental behavior and deterring and punishing the state sponsors of terrorism. However, because the amended FSIA targets foreign nations and not individuals<sup>40</sup>, the possible strategic benefit of this statute must be considered in relation to potential costs in terms of impeding the free conduct of foreign policy by the executive branch of the U.S. government<sup>41</sup>. Acting unilaterally in imposing damages against foreign countries based on domestic court judgments bears certain risks in terms of, most notably, the reciprocal nature of foreign policy and relations

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attorney involved in numerous cause related litigation matters). The primary organization used by plaintiff's attorneys to lobby for their causes is the American Trial Lawyers Association.

<sup>39</sup> Id.

<sup>40</sup> There is no bar to suing foreign individuals in their personal capacities in the federal court system. There are several statutes that could be used to civilly punish individual terrorists, most notably the Torture Victim Protection Act of 1991, Pub L. No. 102-256, 106 Stat. 73 (1992) and the Alien Tort Claims Act, 28 U.S.C. § 1350 (1994), as cited in Murphy at pg. 29. Unfortunately, the likelihood of obtaining personal jurisdiction over these types of individuals is not very likely. It is extremely unlikely that any of them would make themselves available for service of process and trial in U.S. civil courts. Individual terrorists also have varying economic situations that might make civil suits against them meaningless. See also, *Pennoyer v. Neff*, 95 U.S. 714 (1877) outlining considerations for obtaining personal jurisdiction over individuals.

<sup>41</sup> Robert Schmidt, *Bid to Collect Assets Collides With Foreign Policy Concerns*, Legal Times, Federal Court Watch, Aug. 10, 1998, pg. 1; See also, David Lyons, *U.S. Fights Plaintiffs' Efforts to Collect Damages Under Anti-Terrorism Law*, Fulton County Daily Reporter, April 6, 1999.

The interest of the U.S. Congress in attempting to fashion a remedy to lessen the suffering of victims of terrorism is laudable. It is impossible to argue with the thought that victims should receive compensation for their losses. Contention arises only in considering how compensation should occur. Congressmen downplay the significance of foreign policy in this area and emphasize the need for constituents to be compensated for losses.<sup>42</sup> The irony in the situation, and something that Congressmen who address this matter routinely comment on, is that it was the Clinton administration that asked for the amendment in the first place, and that once passed, it is the Clinton administration that stands in the way of the families collecting on their judgment<sup>43</sup>. The fact that Iran and Cuba failed to appear in either the Flatow or Alejandre cases caused the Justice Department to appear in court on their behalf to oppose attachment actions undertaken by families of the victims<sup>44</sup>. The Justice Department argued on each occasion that it is not appearing on behalf of Cuba or Iran but, rather, to protect the national security interests of the U.S. government<sup>45</sup>. One must wonder whether the President had completely considered his remarks prior to asking for this amendment to the FSIA, and whether he considered that the litigants would ever get to the point of attaching property belonging to Cuba or Iran.

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<sup>42</sup> Connie Mack, Victims of Terrorism Still Waiting for Justice, USA Today, Oct. 25, 1999, pg. 19A.

<sup>43</sup> Id.; See also Miller, Mintz at note 18.

<sup>44</sup> Id.

<sup>45</sup> Robert Schmidt, Bid to Collect Assets Collides With Foreign Policy Concerns, Legal Times, Aug. 10, 1999, Pg. 1.

## FSIA Policy Debate

Proponents favoring liberalization of the FSIA argue terrorist acts are inconsistent with the concept of sovereign immunity, which traditionally protects governments from lawsuits and attachment of governmental property<sup>46</sup>. They assert that assets of state sponsors of terrorism should not be immune from attachment except in the case of property centrally related to a diplomatic or consular function<sup>47</sup>. The rationale for allowing this piercing of the traditional sovereign veil is to compensate victims, punish state sponsors of terrorism, and to deter states from similar conduct in the future<sup>48</sup>. While punishment and compensation would definitely result from allowing these kinds of suits to be concluded with successful attachment of assets, the case for deterrence is not so easily proven<sup>49</sup>. Proponents of liberalization also argue that the current administration has been duplicitous in calling for amendment of the FSIA and then appearing in court to block attachment of property once judgments are obtained<sup>50</sup>. While this may be an overly harsh characterization of the Clinton administration's position on this issue, one can convincingly argue that the approach of the Clinton administration has been, at

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<sup>46</sup> Leonard Garment, Capitol Hill Hearing Testimony, Senate Judiciary Committee, October 28, 1999

<sup>47</sup> Id. This is commonly referred to as the "restrictive" theory of sovereign immunity, which states that nations do not have sovereign immunity for commercial or private acts. See also note 6 above.

<sup>48</sup> Id. See also, Statement of Senator Hatch at note 29

<sup>49</sup> See John Lancaster, U.S.: Iran's Terrorism Role Grows, Washington Post, Dec. 4, 1999, at Pg.1; Cf. note 32 above, statement of Patrick Clawson.

<sup>50</sup> See Miller, Mintz at note 21; See also statement of Mr. Steven Flatow, "Protecting Iranian assets of any type is equivalent to the FBI director saying he's tough on gangsters but needs to be sensitive to the Mob." As cited in Warren D. Zaffuto, A "Pirate's Victory": President Clinton's Approach to the New FSIA Exception Leaves the Victors Empty-Handed, 74 Tul. L. Rev. 685, at 709.

best, inconsistent in this area<sup>51</sup>. This is most clearly seen in the *Alejandro* case when the administration provided each victim \$300,000 from blocked Cuban assets but then later exercised waiver over other property attached on the basis of the judgment<sup>52</sup>. Another example of this inconsistency occurred when government representatives offered to pay a portion of the *Flatow* judgment from U.S. treasury funds instead of blocked Iranian assets<sup>53</sup>. While this would compensate the victim, it would neither punish Iran nor deter it from future acts of terrorism. Thankfully, the *Flatow* family, in discussing this matter with government officials, recognized the logical incongruity of accepting U.S. treasury funds in satisfaction of their judgment and refused the offer of payment<sup>54</sup>.

There are several other arguments in favor of liberalizing the FSIA. One is that the State Department controls designation of which nations are state sponsors of terrorism<sup>55</sup>. Accordingly, If the State Department does not wish to see certain nations punished by this statute, it should remove them from the list of state sponsors of terrorism, rather than quash attachment actions by holders of judgments awarded under the FSIA. The other problem with current governmental policy is that use of Presidential Determinations as waivers plays into the hands of Congress in terms of who controls foreign policy in this area. By consistently playing within the bounds of this statute and using the waiver provision it provides,

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<sup>51</sup> See *Alejandro II*, 42 F. Supp. 2d, 1317, 1332 (S.D. Fla.), vacated, 183 F. 3d 1277 (11<sup>th</sup> Cir. 1999)

<sup>52</sup> See *Miller*, *Mintz* at note 21.

<sup>53</sup> *Carrie Johnson*, *Inadmissible*, *Legal Times*, Nov. 22, 1999, pg. 3.

the President is seemingly limiting his options as the primary instrument of U.S. foreign policy<sup>56</sup>.

Those arguing against liberalization of the FSIA make a number of arguments summed up in the statement of Stuart Eizenstadt to the Senate Judiciary Committee<sup>57</sup>. The first argument is that allowing plaintiffs access to the blocked assets of state sponsors of terrorism in the United States would detract from the Executive branch's ability to use those assets as leverage in conducting foreign policy. This is understandable but the argument is clouded by government actions in providing blocked assets in the *Alejandro* case. The second argument is that allowing attachment of the assets of a foreign government could cause the U.S. to breach terms of some international agreements it is party to. The argument here is that unless adequate scrutiny of attachment process occurs there could be violations of the Vienna Convention on Diplomatic Relations<sup>58</sup>. This is a possibility, though it would seem that a greater concern would be that foreign sovereigns would not understand distinctions occurring as a result of the FSIA and might attempt a broader type of retaliatory measure. Third, an argument is made that

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<sup>54</sup> *Id.*

<sup>55</sup> See Note 10 above.

<sup>56</sup> Joseph W. Glannon and Jeffrey Atik, "Article: Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act", 87 *Georgetown Law Journal* 675, February, 1999 at 701. Authors point out that case law establishes that President has authority to compromise domestic judgments for foreign policy purposes. A president will be hard pressed to make that argument after working within the confines of the FSIA and using its waiver provisions for the last 5 years.

<sup>57</sup> See Note 23 above.

<sup>58</sup> Vienna Convention on Diplomatic Relations and Optional Protocols, U.N.T.S. Nos. 7310-7312, vol. 500, pp. 95-239, 18 April 1961.

allowing this type of recovery would put interests of a small group of Americans (those holding judgments) over the interests of the citizenry in general. The problem with this argument is that it assumes that the interests of the rest of the citizenry of the United States are necessarily opposed to providing compensation to the victims. Obviously there are some citizens who would look forward to a rapprochement with Cuba, Iran, and Libya, but there are probably many others who would like to see an opposite result. By having funds available, however, options remain open to the executive branch. Fourth, it is argued that allowing attachment under these circumstances endangers assets of the U.S. government abroad in terms of a potential reciprocal recovery, thereby damaging the financial state of the U.S. government. Mr. Eizenstadt points out that we are the nation with the most sovereign property abroad, currently valued at between 12 to 15 billion dollars<sup>59</sup>. Lastly, it is argued that the proposed amendment would blur distinctions made at law between business entities and make corporations liable for the debts of their governments. This is likely true. Blurring distinctions that have existed in terms of judicial presumptions relating to control of corporations and property would likely have a destructive effect on foreign relations. It is unlikely that foreign sovereigns would be able or willing to understand these distinctions. It is likely they would perceive these changes as a property grab and something worthy of retaliation.

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<sup>59</sup> See Note 21 above.

In terms of foreign reaction to the FSIA and the suits brought under it, there have been several reactions. Several "government controlled civic organizations" in Cuba filed a lawsuit within its domestic court system asking for 181 billion dollars in damages caused by the "aggressive US policy", including "acts of sabotage, bombardments and other terrorist acts"<sup>60</sup>. Another example is the reported passage of an Iranian law nearly mirroring the FSIA amendments, allowing suits against the U.S. for "harboring or supporting terrorists"<sup>61</sup>. Additionally, after the filing of a lawsuit against Iran by former hostage Terry Anderson, the Hezbollah responded to the Associated Press to deny his accusations and to deny that they are a terrorist group<sup>62</sup>.

In the recovery effort by victims in the *Alejandro* case, plaintiffs sought attachment of funds sent to Cuba by telecommunications companies as part of their share of profits for telephone service between the U.S. and Cuba<sup>63</sup>. In preparation for litigation over this matter, the federal courts ordered \$19 million dollars in assets intended for these companies frozen until the litigation concluded. Cuba, in response to this action, cut off telephone service with the United States stating that without the frozen funds it could not continue to operate service between

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<sup>60</sup>Pascal Fletcher, \$181bn DAMAGES SOUGHT, Cuba to sue Washington, Financial Times (London), June 2, 1999, page 4.

<sup>61</sup>Bradley J. Hernlem, Letter to the Editor, Scapegoats for Terrorists, The Washington Post, November 18, 1999, OP-ED; pg. A40.

<sup>62</sup> See Miller article at note 13; See also, Associated Press, Hezbollah rejects ex-hostage's kidnapping suit, The Boston Globe, March 24, 1999.

<sup>63</sup> See *Alejandro II* at note 36.

Cuba and the United States.<sup>64</sup> At the District Court level the court upheld the attachment of these funds and awarded \$6.2 million dollars in money intended for Cuban long distance telephone companies<sup>65</sup> to the victim's families<sup>66</sup>. On appeal, the 11<sup>th</sup> Circuit Court of Appeals overturned this ruling, finding that the Cuban telecommunications entity was separate and distinct from the government of Cuba and on that basis the funds were improperly awarded to victim's families<sup>67</sup>.

The reactions of the Iranian and Cuban governments as well as that from Hezbollah demonstrate that the statute and lawsuits it made possible are being noticed around the world. Phone service between the U.S. and Cuba earns the Cuban telecommunications company ETECSA generates an estimated \$75 million dollars a year for Cuba<sup>68</sup>. The rapidity of responses from Iran and Cuba demonstrate the likelihood there would be definite reciprocal responses to domestic actions taken under this statute. It is equally likely that assets awarded to litigants under this statute would hinder the possibility of a rapprochement with defendant countries, and that foreign countries might base reconciliation of relations on refunds of awards provided to litigants under this statute.

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<sup>64</sup> Direct Phone Service to Cuba is Cut Off, New York Times, Feb. 26, 1999, pg. A-16; Patricia Grogg, Politics: Row Over Money Threatens U.S.-Cuba Phone Links, Inter Press Service, Feb 10, 1999.

<sup>65</sup> Under the ruling by the court, it found that all the entities named in the lawsuit were "separate juridical entities" from the Cuban government, and that the plaintiff's had not adequately proved otherwise. There is a legal presumption that corporations are separate from one another as well as from the individuals or entities that found and operate them. This problem was also encountered by the Flatow family in attempting to attach the assets of the Pahlavi Foundation in Washington, D.C (Flatow v. Iran, 1999 U.S. Dist LEXIS 13759, No.98-4152, 1999 WL 711073 (D. Md. Sept. 7, 1999).

<sup>66</sup> 183 F. 3d 1277, 1289

<sup>67</sup> See note 51 above.

<sup>68</sup> See note 37 above.

A possible solution to this problem would be for the U.N. to provide a forum for these kinds of cases. This would have several beneficial aspects. First, it would eliminate the "bilateral" problem of prosecuting these cases in an U.S. domestic court. Using an U.S. court to prosecute these types of cases will always make their judgments subject to concerns about reciprocity, as well as perceived or actual politicization of the judgments. Having a world body litigate these types of cases will minimize the potential for reciprocal or retaliatory actions by defendants.

Second, having an international body issue these judgments would likely make judgments enforceable worldwide, not just in the U.S. where foreign country assets may be limited. Having judgments issued by an international body would allow third party nations to comply with judgments and attachment orders with lessened worry about future relations with the offending country<sup>69</sup>. The possibility of a worldwide enforceable judgment would also exponentially increase the deterrent effect on potential offending countries. Another beneficial aspect of having these worldwide enforceable judgments is that the defendant countries and/or individuals would be likely to make an "appearance" before the court in order to avoid the possible attachment of property. Until now, only Libya has made an appearance in the U.S. Federal Courts in a case brought under this statute<sup>70</sup>. Both Cuba and Iran, while served, have refused to appear in court and had default judgments entered

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<sup>69</sup> See note 56 above, at 701.

against them. The spectacle of having to appear in front of a world body—even to contest a charge of terrorism would likely carry a substantial deterrent effect.

Until the very near past, one could fairly forcefully argue that establishment of such a world body was a utopian idea hardly worth more than a passing thought in terms of it actually coming to being. However, with recent passage of the Rome Treaty creating the International Criminal Court (ICC)<sup>71</sup> and enactment of UN International Convention for the Suppression of the Financing of Terrorism (ICSFT)<sup>72</sup>, one can argue that civil prosecution of terrorists is the next logical step in deterring terrorism and providing for the victims of terrorism. While neither document fits the facts of the cases discussed in this paper precisely in terms of providing compensation to American victims of terrorism, their passage (ICC) and likely future passage (ICSFT) demonstrate that the traditional reticence to infringe on a nation's sovereignty is fading, particularly in the face of egregious terrorist conduct.

Another aspect that should be a part of any considered treaty or legislation is that it should be forward looking. One of the most troublesome aspects of the FSIA is

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<sup>70</sup> See Rein, at note 12 above.

<sup>71</sup> U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, art. 126, U.N. Doc. No. A/CONF. 183/9 (1998) as cited in Cara Levy Rodriguez, COMMENT: Slaying the Monster: Why the United States Should Not Support the Rome Treaty, 14 Am. U. Int'l L. Rev. 805, at 806.

<sup>72</sup> International Convention for the Suppression of the Financing of Terrorism, Adopted by the General Assembly of the United Nations in Resolution 54/109 of 9 December 1999 (visited Jan. 24, 2000 at <http://www.un.org/law/cod/finterr.htm>); See also, Hubert Vedrine, Anti-Terrorism Pact Goes for the Jugular, The San Francisco Chronicle, January 18, 2000, pg. A-19

its retrospective feature, whereby litigants may look to incidents in the past in litigating cases under the amended statute. If the UN were to create a terrorism court, it should only have jurisdiction over events coming after its passage. This would draw a clear line in terms of jurisdiction and allow countries to conform their behavior to the terms of the treaty. Unfortunately this would leave current victim's families without an option, but would greatly enhance the likelihood of its adoption by the nations of the world.

Interestingly, the U.S. and France played a key role in moving the ICSFT quickly through the general assembly<sup>73</sup>, while with the ICC the U.S. joined an odd and extremely outnumbered rogue's gallery in terms of opposing that treaty<sup>74</sup>. While there are good substantive reasons why the ICC is objectionable to the U.S., the passage of this kind of legislation portends the future. It is imperative that the U.S. take a more active role in drafting this type of legislation and educating allies on objectionable provisions in a timely and effective way. As it currently stands, even though the U.S. voted against the Rome treaty U.S. soldiers and citizens might find themselves subject to its jurisdiction<sup>75</sup>. The U.S. should work much more diligently on formulating these types of conventions and treaties in ways that benefit our interests and put us at the cutting edge of this movement. They are the way of the future and will, properly drafted and implemented, represent an effective

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<sup>73</sup> See Vedrine at note 47.

<sup>74</sup> See note 71 above. The final vote was 120-7. Notably, all of the other G-8 nations voted for the treaty. The U.S. sided with China, Israel, Iraq and Iran amongst others.

strategic tool in terms of deterring and combating terrorism as well as providing compensation for victims of terrorism.

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<sup>75</sup> See note 71 above. The treaty applies to crimes committed by nationals of countries who signed the treaty or for crimes committed by any party on the territory of a signatory.

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